

What You Did This Summer

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Maximilian Steinbeis Sa 7 Jul 2018

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Dear Friends of Verfassungsblog,

may I ask you a favour right at the beginning? I had already asked in my editorial four weeks ago, perhaps you remember. The thing is: We need your support. Our target is to have 1000 of regular readers who contribute 4 Euros per month to the upkeep of Verfassungsblog. Way to go, to be honest: at this moment, the number is 139. Might it be, just a wild guess, that you, for plenty of valid reasons, haven't supported us yet? Oh, you have? Thanks a million. Or you have not, but actually would in fact be rather happy to? Well, the good news is that now is the perfect moment to do it. All it takes is to click

[HERE](#).

It's easy, quick, safe and comfortable, and this editorial will wait right here for you to finish reading after you're done.

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What can I say! Thank you very much! That's great. Much obliged, really!

In fact, this has been once again a totally unbelievable week. Truly, if there is one thing I can't complain about these days it's boredom. What is happening in Poland in terms of subjugation of the judiciary defies imagination, and so does the course of events in the German CDU/CSU conflict over refugee policy. Meanwhile, in Luxembourg a decision of utmost importance is being prepared, on whether the EU and the principle of mutual trust is a potent antidote to cross-border authoritarianism or, on the contrary, degenerates into its tool. And as if all that wouldn't be enough for an ordinary pre-vacation July week, there is the awesome decision by the Constitutional Council in France which gives the lofty principle of *fraternité* a real legal edge in these times of anti-migrant clamp-down.

Terrible and laughable

But first things first. In **Poland**, despite all EU pressure, the PiS government has enacted a law that forces all judges of the Supreme Court over the age of 65 into involuntary retirement – unless they are nice and polite and ask cap in hand President Duda to let them stay. This would also apply to Chief Justice Małgorzata Gersdorf, although her term of office of 6 years is directly stipulated in the constitution. This not only throws in stark relief the fundamental contradiction of PiS populism – it has won a mandate to govern in the 2015 elections, but not to change the constitution. What is more, President Duda, in defining who will be promoted to deputy, provisional or actual Chief Justice in Gersdorf's place, and on what basis and in what procedure, has entangled himself in such a horrible knot of legal absurdities that one would laugh out loud if the whole thing were not so terrible. WOJCIECH SADURSKI wrote down the whole tragicomedy.

Horst Seehofer, the head of the German right-wing populist party in government, also looks not exactly dignified at the end of this remarkable week. His and his party's raging insistence on unilaterally rejecting refugees at the border to Austria at all costs was artfully led to its logical consequence by Chancellor Merkel: namely that Seehofer in his capacity as Federal Home Secretary is the man to enthuse his Austrian "axis of the willing" friends about this splendid idea. In that, he failed, rather unsurprisingly, and now everyone can see what did not require all that much imagination in the first place, namely that Markus Söder's "end of multilateralism" dramatically loses its appeal when seen from the receiving end of unilateral measures. So this is the score in the "final game about credibility" (again a Markus Söder quote, a true treasure trove...) of the CSU? Highly deserved, I'd say.

But there is no reason for amusement, even of a grim nature, of course. The CDU/CSU coalition brawl has engendered a legalo-politico-literary innovation which in itself seems to belong to the horror and fantasy genre: the "fiction of non-entry". Certain migrants are legally declared to never have stepped on German territory even if they clearly have. That the law pretends that what exists does not exist or vice versa is not unheard of, but to use this magic trick to strip subjects of state power of their rights is a decidedly different matter, as DANA SCHMALZ points out with great emphasis. MATHIAS HONG demonstrates the limits the *Grundgesetz* sets to the fictive creativity of the legislature. The origin of this "fiction of non-entry" monstrosity is the asylum procedure at the airport where applicants are held in a sort of quasi-extraterritorial off-limits area of the airport for a couple of days, and OLAF KLEIST clarifies why that is not comparable to a "fiction of non-entry" at the land border. MAX PICHL sees the goal of the whole exercise in the "Orbánisation" of Germany: "The core of this measure is to implement the illiberal and anti-European form of *Rechtsstaat* in Germany that has already advanced far in Hungary. In the long term, the goal of nationalists is that the *Rechtsstaat* should only formally exist on paper. The constitutional state in its authoritarian transformation is then only a dummy, because those affected no longer have access to it."

Waiting for Celmer

Back to **Poland**: If the Polish judiciary has become a dependent tool of the government, can we expect of an Irish judge to execute a Polish EU arrest warrant and extradite the wanted person without further ado? PÉTRA BARD and WOUTER VAN BALLEGOOIJ have taken a closer look at the opinion of Advocate General Tanchev in the epochal *Celmer* case in which the ECJ will give an answer to this question. Unlike the Advocate General, they see the problem not so much in Mr Celmer's subjective right to a fair trial, but in the objectively deplorable state of the rule of law in the Republic of Poland. MICHAL KRAJEWSKI argues it would be too much to expect of the Irish judge, as Tanchev does, to prove not only systemic shortcomings in the Polish judicial system, but also Mr Celmer's individual risk resulting of these deficits before refusing to execute the arrest warrant. Instead, the Court should take its cue from the Strasbourg Court's "appearance of independence" test.

How will the Court of Justice decide? On 25 July we will know the answer.

Verfassungsblog, together with ARMIN VON BOGDANDY and the Max Planck Institute for Comparative Public Law and International Law (MPIL), we will hold an online symposium

on this occasion and provide comments and analysis of the decision from a number of different perspectives.

Meanwhile, the PiS government in **Poland** has once again been creative to make sure that the will of the sovereign Polish people accords with PiS rule. Elections are how the people expresses its will in a democracy, and the electoral law can be shaped in this way or that, and that is what PiS is doing right now with respect to the upcoming European elections, as RYSZARD BALICKI reports.

All men become brothers

In **France**, the Constitutional Council has declared a law that penalises aid for refugees partially unconstitutional – a truly revolutionary act in that it endows, after *liberté* and *égalité*, also the principle of *fraternité* with a cutting legal edge. Who would have guessed, in these trying times! A person can't be declared a criminal for helping his fellow man just because this help incommodes the supposed *raison d'état*. BENJAMIN BOUDOU describes what the *délit de solidarité* is all about.

In **Austria**, the Constitutional Court has also handed down a highly remarkable decision: The existing law is to be interpreted in such a way that intersexual persons are no longer forced to identify themselves as men or women. ELISABETH GREIF reports.

The Free and Hanseatic City of **Hamburg** wants to introduce a gender quota for hiring public prosecutors – to favour men over women. Is this compatible with constitutional and European law? In MARIA WERSIG's sober analysis, it is not. Even if the prosecutor's offices in Hamburg are predominantly staffed by women, there can be no question of a gender-specific structural disadvantage of men, which could justify a preference according to gender.

The European Court of Justice will render an opinion on the CETA Free Trade Agreement between the EU and **Canada** and has held an hearing in that matter last week to this end. GESA KÜBECK reports on the proceedings.

In **Pakistan**, the tribal areas on the border to Afghanistan are to be subjected to the Pakistani constitution and integrated into the administrative structure of the country, which prompts ADEEL HUSSAIN to take a look at the history of this wild region.

And glossator FABIAN STEINHAUER writes this week about law, art, bad luck and Maxim Biller.

Elsewhere

ANNA LÜBBE examines the results of the EU summit on asylum policy.

LUC VON DANWITZ reports on a ruling by the European Court of Justice that confirms Marine Le Pen's obligation to repay 300,000 euros to the European Parliament without falling into the populist traps set by the head of the party formerly known as Front National.

MANUEL MÜLLER predicts a hot summer for the European People's Party over the membership of Viktor Orbán's Fidesz party.

ALEKS SZCZERBIAK reflects on the impact the rule of law conflict between Poland and the EU could have on national policy in Poland.

MURRAY HUNT sees the attacks in Poland on the independence of the judiciary as part of a global trend.

STEPHEN TIERNEY describes how the constitutional weights in Great Britain are shifting more and more to the detriment of Parliament and in favour of the government.

GAUTAM BHATIA reports on a decision of the Indian Supreme Court on the special status of the capital Delhi.

So much for this week. Thanks for reading this editorial to the end. May I remind you of the favour I asked for at the beginning? No need to scroll up all the way, just click [HERE](#).

All the best, and a successful week!

Max Steinbeis

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